IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 20 of 2005

With

CIVIL APPLICATION No.110 of 2005

For Approval and Signature:

THE HONOURABLE MR.JUSTICE R.S.GARG
THE HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1	Whether Reporters of Local Papers may be allowed to see the judgement ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgement ?
4	Whether this case involves a substantial question of law as to the interpretation of the constituition of India, 1950 of any order made thereunder ?
5	Whether it is to be circulated to the civil judgte ?

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PVD PLAST MOULD INDUSTRIES LTD. - Petitioner(s)

Versus

ING BHF BANK AKTIENGESELLSCHAFT - Respondent(s)

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Appearance :

MR HS MUNSHAW for Petitioner No(s).: 1.

None for Respondent No(s).: 1.

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CORAM :THE HONOURABLE MR.JUSTICE R.S.GARG

THE HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date : 17/06/2005

ORAL JUDGMENT

(Per : THE HONOURABLE MR.JUSTICE R.S.GARG)

1. Heard learned counsel for the appellant. Present is an appeal under Section 483 of the Companies Act against order dated 11.05.2005 passed by the learned Company Judge in Company Petition No.14 of 1999 whereunder, the winding up petition was admitted for hearing and a direction was issued for its publication in two daily newspapers.
2. Mr.Soparkar, learned counsel for the appellant submitted that the transaction between the appellant company and the original petitioner/respondent was a loan transaction which at the cost and expenses of the present appellant was insured. The loan transaction took place somewhere in the year 1993 and after the appellant failed to make the payment, the respondent/the principal creditor received the money from the Insurance Company. It was submitted by him that the Court should not exercise its discretion as the suit was already filed. However, while we were dictating the judgment, he submitted to us that the suit was instituted atleast four months after the present winding up petition was filed.
3. Mr.Soparkar submitted that the principal creditor after having received almost about 95% of the loan amount from the Insurance Company, was entitled to 5% from the present appellant company and as the present appellant company was ready and willing to make the payment of the same, the learned Single Judge should not have exercised his discretion in favour of admitting/publishing the notice in relation to the company.
4. Placing reliance upon certain judgments of the different Courts, it was submitted that as the net worth of the company is positive and it is a running and profit making company, the learned Company Judge should not have admitted the petition to give death knell to the working of the company. His further submission was that as the total worth of the company is more than Rs.115 crores, the loan was for Rs.40 crores and the net worth of the company is more than Rs.33 crores as on today, the learned Single Judge should not have entertained the petition and he could not exercise his discretion in favour of the respondent.
5. Mr.Soparkar has placed reliance upon the Single Bench judgment of this Court in the matter of **AMERICAN EXPRESS BANK LTD. VS. CORE HEALTH CARE LTD.**, 1999, Vol.96, Company Cases, page No.841. That was a case where the company was employing more than 3,500 persons and was having a turnover of more than Rs.200 crores per year. The Court had recorded a positive finding that value of gross assets as per the balance sheet far exceeded its liability leaving a substantial balance surplus for the shareholders far in excess of their contribution. He has also relied upon Division Bench judgment of this

Court in the matter of **TATA IRON &STEEL COMPANY LTD. Vs. MICRO FORGE (INDIA) LTD.**, 2000 (2) GLR, page No.1594. In the said matter, a Division Bench of this Court has summarized the legal principles and observed that in what particular cases a Company Petition should not be admitted. The Division Bench, however, has observed that the discretion is to be exercised by the learned Company Judge in the matter like present in favour of the company, if the net worth is positive and the company is ready and willing to discharge the dues or liabilities. In the said matter, after giving the Profit &Loss Account for the year 1996-97, 1997-98 and 1998-99, the Court observed that the net current assets of the company were increasing from Rs.818.33 lacs to Rs.913.42 lacs i.e. there was a net increase of more than Rs.90 lacs within two years. After going through the said judgment, we are of the opinion that the said judgment on the facts does not apply to the present matter.

6. In the present matter, it is to be seen that the loan was taken by the company somewhere in the year 1993 and the company which claims to be running profit making assetful company, did not discharge its liability within the statutory period despite the demand notice and the Insurance Company had to discharge the liability. The endeavor of Mr.Soparkar was to convince us that if the creditor company has already received 95% of the loan amount and the Insurance Company has not lodged its claim against the appellant company, the Court must not exercise its discretion in favour of the admission of the winding up matter. The argument is one of frustration. We are unable to understand the logic behind the said argument. It is not the case of the appellant that certain goods were insured and in lieu of the goods, the money has been paid by the Insurance Company to the principal creditor. In fact, the loan amount/loan transaction was insured. The petitioner cannot say that once the Insurance Company has paid the money to the principal creditor, then the appellant company is not answerable to anybody. The appellant company is still liable and applying the principle of subrogation, the Insurance Company can always recover the money from the appellant and in any case, if the money is received by the creditor company then, to the extent of the receipts, the creditor company would refund the money to the Insurance Company. That would be a matter between the Insurance Company and the creditor company. The debtor is not entitled to take any benefits out of the said transaction.
7. The said judgment in the matter of TATA IRON &STEEL does not apply to the facts of the present case.

8. Reference was also made to the order dated 09.10.2000 passed in Company Petition No.197 of 2000 by the learned Single Judge which was approved by a Division Bench in O.J.Appeal No.27 of 2000 on 27.11.2000. In the said matter, the learned Single Judge observed that the petitioner had not come to the Court bonafide and he had already instituted the suit much before filing the Company Petition. In the present set of circumstances, it is now not disputed before us that the suit has been filed much after institution of the winding up matter. The facts of the said case were totally different.
9. Reliance was also placed upon the judgment of the Apex Court in the matter of **DOLPHIN INTERNATIONAL LTD. Vs. GAVS LABORATORIES LTD.**, 2003 (96) FLR, 304 to contend that if the balance sheet shows good business and the creditor company has already filed a suit for recovery and the debtor company has already furnished the security in form of bank guarantee, the petition for winding up should not be entertained. In the present case, the company though shows that it is a profit earning company, but the figures would show that on total value of more than Rs.115 crores, the net profits are less than Rs.1 crore per year. Though it is contended before us that the company has employed almost about 100 persons, but further details about the same has not been given except providing balance sheet. The balance sheet for the year up to 31.12.2003 shows the net worth as Rs.114 crores, which on 31.12.2002 was Rs.125 crores. The net profit is Rs.1,05,58,339/-. The totality of the circumstances would show that the company is hardly meeting its both ends and virtually has become insolvent in discharging its liabilities. Though Mr.Soparkar repeatedly submitted that the company was ready and willing to discharge the liability to the extent of 5%, but it does not appear that the real cash was ever brought to the Court or was shown to anybody. The assurances given by people like present appellant company are not encashable in the market. The photograph of the money cannot be encashed.
10. Taking in to consideration the totality of the circumstances and the manner in which the present company has behaved and as on today the liability of the appellant company qua the creditor company is more than Rs.65 crores, we are of the opinion that the learned Single Judge was absolutely justified in admitting the Company Petition. The appeal is dismissed.
11. In view of the dismissal of the appeal, the Civil Application stands disposed of.

(R.S.GARG, J.)

(RAVI R.TRIPATHI, J.)

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